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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

No. CR 01-00435 CRB

12 Plaintiff,

ORDER RE: RESENTENCING

13 v.

14 REGINALD AKINS,

15 Defendant.
16 _____/

17 Defendant Reginald Akins was convicted of two counts of armed robbery, two counts
18 of use of a firearm in furtherance of a crime, and felon in possession of a firearm. Although
19 the jury found under the reasonable doubt standard that Akins merely used, rather than
20 “brandished” a weapon during the offense, the Court found for sentencing purposes, under
21 the preponderance of the evidence standard, that Akins brandished the weapon. The Court’s
22 finding resulted in a mandatory minimum sentence.

23 The Ninth Circuit affirmed Akins’ conviction and sentence in an unpublished
24 memorandum. United States v. Akins, 102 Fed.Appx. 88, 2004 WL 1398595 (9th Cir. May
25 11, 2004). Akins filed a petition for certiorari to the United States Supreme Court. While
26 that petition was pending, the Supreme Court decided United States v. Booker, 543 U.S. 220,
27 125 S.Ct. 738 (2005), and subsequently granted Akins’ petition. The Supreme Court ordered
28 the case remanded to the Ninth Circuit for consideration in light of Booker.


1 On July 26, 2005, the Ninth Circuit Court of Appeals remanded this action to this
2 Court “for the purpose of determining whether the sentence imposed would be materially
3 different under *Booker*, 125 S.Ct. 738.” Although the government had previously submitted
4 a brief to the Court of Appeals that argued that remand was unwarranted in light of the
5 Supreme Court’s decision in *Harris v. United States*, 536 U.S. 545 (2002), the Ninth Circuit’s
6 remand order makes no mention of *Harris* or the government’s argument.

7 Then, on September 23, 2005, the Ninth Circuit decided *United States v. Dare*, 425
8 F.3d 634 (9th Cir. 2005). *Dare* held that under *Harris*, sentencing a defendant to a mandatory
9 minimum based on judge-found facts does not violate the defendant’s Sixth Amendment
10 rights provided the sentence is not beyond the statutory maximum. 425 F.3d at 640-41. The
11 court agreed that *Harris* “is difficult to reconcile with the Supreme Court’s recent Sixth
12 Amendment jurisprudence,” *id.* at 641, but nonetheless held that it must follow *Harris*
13 because it has not been expressly overruled by the Supreme Court. *Id.*; *see also id.* at 643-48
14 (Bea, Circuit Judge, dissenting) (concluding that *Harris* is not good law after *Booker*).

15 This Court, too, agrees that *Harris* cannot be reconciled with *Booker* and is therefore
16 not good law; thus, if it had the discretion to do so, it would resentence Akins. As a district
17 court, however, the Court is bound by *Dare*. Because *Dare* is on all fours with this case, the
18 Court concludes that it does not have the discretion to resentence Akins until the Ninth
19 Circuit orders otherwise.

20 **IT IS SO ORDERED.**

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23 Dated: March 8, 2006



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE